No. 901

APR 19 1941
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Supreme Court of the United States

OCTOBER TERM, 1940.

BAKERY AND PASTRY DRIVERS AND HELPERS LOCAL 802 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, PETER SULLIVAN, individually and as President of the said Union, PADDY SULLIVAN, individually and as an officer of the said Union, and HYMAN BERNSTEIN, individually and as business agent of said Union, all of 265 West 14th Street, New York City,

Petitioners,

against

HYMAN WOHL and LOUIS PLATZMAN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HYMAN WOHL,
LOUIS PLATZMAN,
Respondents in Person.

Of Counsel:
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ACKERMAN PRESS, Inc., 142 Liberty St., Phones RE ctor 2-5856-7

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IN THE

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HYMAN WOHL and LOUIS PLATZMAN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I. Statement of the Case.

The respondents' case has been conceded by the petitioners. They have admitted that they have been unable to disprove any of the evidence offered by the respondents. Notwithstanding this fact, the petitioners in their brief omitted to mention vital facts which are more than sufficient to have this Court deny this application.

The respondent Wohl has been, at the time of trial, engaged as an independent peddler for more than 5 years

(R. 64). At the time of trial, he purchased his baked products from four bakers (R. 64, 87). That he had no contract with anyone of them and that he was at liberty to buy from any other baker (R. 65). That he owns his own truck and had owned a truck during the said 5 years (R. 65, 66, 153). That he did not employ anyone (R. 67) and was able to manage his own business without any help (R. 67).

The respondent Platzman testified that he has been in the same business for 2 years and purchased his baked products from two bakers (R. 99, 100). That he was always at liberty to buy from whomever he wanted (R. 101). That he had no contract with any baker (R. 101). He further testified that he could manage his own business without any help and that he employed nobody.

The foregoing is in short the respondents' case and it is called to the attention of this Honorable Court because the decision of this Court may be based thereon. The instant case differs from the case of Milk Wagon Drivers Union v. Lake Valley Farm Products, 311 U. S. 91, in that in the latter case there was a contract between the vendors and the dairy and furthermore the vendors were actually in the employ of the dairy. In that case there was a labor dispute. In the instant case, there was no labor dispute (R. 59).

It is unnecessary to call to this Court's attention any more of the facts as the determination of this application does not depend thereon. However, the respondents want to correct a serious error committed by the petitioners in their petition and that is that the peddler system was not contrived by the wholesale bakers to effect distribution of their bakery products without technically engaging any distribution employees. The petitioners were given an opportunity to prove such a conspiracy, but they admitted that they were unable to do so (R. 130, 142, 143).

Peddling of merchandise by independent individuals has been in existence from time immemorial. City of Buffalo v. Schleifer (2 Misc. Rep. [N. Y.] 216).

The Court's attention is called to the following cases which are to the same effect:

Collender v. Reardon, 138 A. D. (N. Y.) 738;
City of Chicago v. Bartee, 100 Ill. 57;
Commonwealth v. Farnum, 114 Mass. 267.

II. ARGUMENT.

A. This Court cannot review the decision of the Court of Appeals of the State of New York because a federal question was not presented for decision and that the Court of Appeals in making its decision did not pass on any federal question.

Reading the record in this case, it is obvious that no federal question was presented to the Trial Court nor to the Appellate Division. It is necessary that such a question be presented to the lower Court and the proper objections taken (Zucht v. King, et al., 260 U. S. 174). Furthermore the federal question must be substantial in character. These necessary elements are absent in this case.

It is true that in their memorandum to the Court of Appeals, the petitioners made a reference to a federal question. The entire reference is set forth on page 24 of their argument. This is not sufficient to allow this Court to review the decision of the State Court. It must also be shown that the highest Court in the state in making its decision had to determine the federal question. There is nothing in the record from which such an inference can be drawn.

In the case of Honeyman v. Hanan, Executor, 300 U. S. 14, this Court said on page 18:

> "Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that a federal question was presented

to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause."

Lynch v. New York ex rel. Pierson, 293 U. S. 52;
Brown v. Atwell, 92 U. S. 327;
Louisville and Nashville Railroad Company v. Woodford, 234 U. S. 46;
Patterson v. Colorado, 205 U. S. 454.

B. There being no labor dispute, the injunction did not violate the constitutional guarantee of freedom of speech and assembly.

The Trial Court decided and found as a conclusion of law (R. 59):

"1. That the order of Mr. Justice Charles B. McLaughlin, dated January 17, 1939, established the law of the case in that a labor dispute was not involved in this action and that Section 876a of the Civil Practice Act did not apply and upon the facts as found a labor dispute was not involved."

The Court of Appeals of the State of New York affirmed that decision without any opinion (284 N. Y. 220). This Court is bound by that decision.

The cases cited by the petitioners in their brief are not controlling.

Thornhill v. Alabama, 310 U. S. 88;
Senn v. Tile Layers Union, 301 U. S. 468;
Schneider v. State, 308 U. S. 147;
Milk Wagon Drivers Union v. Lake Valley Farm Products, 311 U. S. 91;
Carlson v. California, 310 U. S. 106.

In all of the foregoing cases there was a labor dispute. When there is a labor dispute, the unions have the right to free speech and free assembly, but in the instant case, there is no labor dispute.

The constitutional guarantee of free speech is not absolute (Gitlow v. New York, 268 U. S. 652).

In the case at bar, it is, without a questionable doubt, illegal for the petitioners to picket or strike or to carry placards when there is no labor dispute. It is immaterial whether the dissemination of the opinions of the petitioners are performed in a peaceful and orderly manner.

The sole question was whether there existed a labor dispute. That question was decided against the petitioners. As a result of the decision, the conduct of the petitioners in picketing the respondents, no matter how peaceful and orderly the picketing has been conducted, is unlawful and must be enjoined.

CONCLUSION.

The writ of certiorari requested by the petitioners should be denied.

Respectfully submitted,

HYMAN WOHL,
LOUIS PLATZMAN,
Respondents in Person.

Of Counsel:
JOSEPH APFEL.